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CURRENT TOPICS.

The cases of the Southern Express Co. against the St. Louis, Iron Mountain & Southern Railroad, and the Adams Express Co. v. the Denver & Rio Grande R. Co., heard before the United States Circuit Court in this city last week, have attracted general attention, from the magnitude of the interests at stake and the exceptional importance of the legal questions involved, and from the fact of these being the latest of a number of similar cases heard elsewhere during the past two years. See 13 Cent. L. J. 68. The issues may be briefly stated. The railroad companies having notified the express companies that they would no longer recognize the relation heretofore existing between them, intending themselves to carry on the express business as part of the regular business of the railroad, refused to receive the goods of the express company for carriage in the manner accustomed, and especially denied the asserted right of the express companies to have their goods or packages transported on the cars of the railroad in the immediate charge of an agent of the express company. Thereupon the express companies instituted proceedings to enjoin the railroad from interfering with their business, and asked for a decree which shall, among other things, fix in advance the maximum rate for charges to be made by the railroad for the services rendered. The railroads insist that, as common carriers, they can not give to an express company any other or more favorable facilities than to any other shipper of goods; that they are the sole judges, within their charters, of the charges proper to be made; that, as they may be liable for loss, they can not be compelled to carry goods not delivered into their sole and exclusive charge; and that, if the express companies are injured, they have an action at law for damages. The express companies maintain that railroads are common carriers upon a public highway, and are operated, not for the benefit of the stockholders of the railroads, but for the public; that the express business, as conducted by the express companies, is a public necessity; that, encouraged by the railroads, it has grown to be a public right which a court of equity will not permit to be overturned; and that a court of equity has ample power to adjust all differences between the parties, including the fixing in advance the maximum to be paid for a given amount of service.

We can not here review the many interesting points raised and so ably argued by the learned attorneys of the several corporations. Some of the questions suggested by counsel in argument are of the greatest interest to lawyers, and, before long, may be of vital importance to the people at large. For instance, can a railroad be compelled by a court of equity to furnish, as a common carrier, all the accommodation required of it by a shipper of goods? Can it be compelled to furnish specific accommodation? Can one railroad be compelled to transport or draw on its rails the car of another corporation? Can a railroad transact business beyond or off of its own rail? And more particularly, as involved in this case, can a court of equity regulate in advance rates to govern future transactions between railroads and shippers of goods.

A rather curious controversy arose in Fisk v. Spring in the New York Supreme Court the other day. The question was whether certain goods, being a stock of "gentlemen's furnishing goods," and consisting of underwear, neckties, shirts, jewelry, gloves, umbrellas, etc., which had been levied upon under an attachment, ought to be sold by order of the court as "perishable." The opinion of a majority of a divided court was that they should not. Says Davis, P. J.: "The fickleness of fashion does not, of itself, render articles 'perishable' within the meaning of the Code. When the only damage or deterioration in value arises from a probable change of fashion, it is the fashion that is perishable, not the article; the latter retains all its intrinsic value unchanged in form or substance, ready for the recurring wave of fashion which may restore or even enhance its market value. Under the

rule laid down by the court below and adopted by my brother Brady, there is no article of merchandise that is not "perishable" by the whim or caprice of the hour, or non-perishable as they may rise or fall. The property of defendants when attached would be subject to ruinous sacrifices for which no remedy is provided, if that construction shall prevail."

Attention is called to the communication of Mr. Bailey in another column, on the subject of "Indexing and Digesting." Of course, we do not undertake to commit ourselves to the views there expressed. We print Mr. Bailey's letter because we think his suggestions are entitled to a hearing, and in the hope that it may evoke a reply from others who have had experience upon the subject, and that a discussion may arise which will be productive of much good.

NOTICE OF UNRECORDED DEED TO SUBSEQUENT PURCHASER OR ATTACHING CREDITOR.

I.

No principle of law is better settled or more generally accepted than that notice to a subsequent vendee of an unrecorded deed is equivalent in its effect upon his title to registration.[1] "The registry of a deed was required to give more general notice of the conveyance, than would result from livery of seisin, which was prescribed by the common law for the purpose of notice. But if a second purchaser has, in fact, notice, the intent of the registry is answered; and to permit him to hold against the first purchaser would be to convert the statute into an engine of fraud, instead of protection against it."[2] In many of the cases this doctrine is made to rest upon the theory, that a second conveyance, taken with notice of the prior unrecorded deed, is fraudulent as against the prior grantee.[3] Lord Hardwicke says: "That the taking of a legal estate, after notice of a prior right, makes a person a *mala fide* purchaser. This is a species of fraud, and *dolus malus* itself; for he knew that the first purchaser had the clear right of the estate, and after knowing that he takes away the right of another person by getting the legal estate. And this exactly agrees with the definition of the civil law of *dolus malus*.[4] Fraud or *mala fides*, therefore, is the true ground on which the court is governed in cases of notice."[5] This incapacity on the part of the grantee to take a valid title as against a prior unrecorded deed being dependent upon the fact of notice, is personal to the individual in the chain of conveyances who has notice. Hence, the doctrine is established, that a *bona fide* purchaser from such second grantee, having no knowledge of the fraud, shall hold his title unimpeached as against the first grantee.[6] "In such case, the negligence of the first purchaser is the cause of the difficulty; and although he shall not suffer when his negligence is fraudulently taken advantage of, by a sub-

[1] Ludlow v. Gill, N. Chip. 33; 1 Am. Dec. 694; Morrison v. Shattuck, N. Chip. 19; Avent v. Reed, 2 Stew. 488; Ohio Ins. Co. v. Ledyard, 8 Ala. 866; Galland v. Jackman, 26 Cal. 79; Burkhalter v. Ector, 25 Ga. 55; Morrison v. Kelley, 22 Ill. 610; Ross v. Hale, 27 Ill. 104; Reason v. Edmunson, 5 Ind. 393; Butler v. Stevens, 26 Me. 484; Rogers v. Jones, 8 N. H. 264; Stevens v. Morse, 47 N. H. 532; Den v. McKnight, 11 N. J. L. 385; Jackson v. Leek, 19 Wend. 339; Stewart v. Thompson, 3 Vt. 255; Corliss v. Corliss, 8 Vt. 473; Smith v. Hall, 28 Vt. 364; McMechan v. Griffing, 3 Pick. 149; 15 Am. Dec. 298; Stevens v. Brown, 3 Vt. 420; 23 Am. Dec. 215; Davis v. Blunt, 6 Mass. 487; 4 Am. Dec. 168; Jackson v. Page, 4 Wend. 585; Brown v. Manter, 22 N. H. 472; Schutte v. Large, 6 Barb. 374; Gilbert v. Jess, 4 Wis. 110; Haywood v. Shaw, 16 How. Pr. 119; Stone v. Bartlett, 46 Me. 438; Smith v. Lambeth, 15 La. Ann. 566; Fitzhugh v. Barnard, 12 Mich. 104; McCaskle vs Amarine, 12 Ala. 17; Claiborne v. Holmes, 51 Miss. 146. Notice so far takes the place of the registration that it has been held that if a purchaser of land have actual notice of the existence of a mortgage upon it, which is recorhed, but not indeed, he can not complain of the want of the index. Speer v. Evans, 47 Pa. St. 141. In Tennessee, the statute makes an unrecorded deed void as to creditors, and, consequently, they are not affected by notice of it. Coward v. Culver, 12 Heisk. 540.

[2] Farnsworth v. Childs, 4 Mass. 637; 3 Am. Dec. 249.

[3] Ludlow v. Gill, N. Chip. 33; 1 Am. Dec. 694; Bush v. Golden, 17 Conn. 594; Porter v. Levey, 43 Me. 519; Dey v. Dunham, 2 Johns. 182; Emmons v. Murray, 16 N. H. 385; Spofford v. Weston, 29 Me. 140,

[4] Dig. lib. 4, tit. 3, lex. 2.

[5] Le Neve v. Le Neve, 3 Atk. 654. quoted in McMechan v. Griffing. 3 Pick. 149; 15 Am. Dec. 198.

[6] Trull v. Bigelow, 16 Mass. 406; 8 Am. Dec. 144. See also Brackett v. Ridlon, 54 Me. 426. Mallory v. Stoddre, 6 Ala. 801; Lee v. Cato, 27 Ga. 627; Turluck v. Peoples, 3 Ga. 446. By a parity of reasoning the knowledge of the grantee of land of the existence of an unregistered deed thereto, prior to the deed under which he claims, will not be imputed to the creditors of such grantee. Coffin v. Ray, 1 Met. 212.

sequent purchaser, yet when a third party claims the land, deriving his title from him who, in the public registry, appears to be the lawful owner, negligence ought to turn the scale against the party who was guilty of it."[7]

A further natural consequence of the personal nature of this incapacity to take a valid title is that, where there are several grantees who would take under the subsequent conveyance, and one of them is affected with notice of the prior conveyance, such notice is not to be imputed to his co-tenants, and they are not affected by it.[8] As to creditors, the weight of authority seems to be that the presumption of fraud arising out of the fact of notice by a subsequent purchaser of a prior unrecorded deed, will not apply to them.[9] In Massachusetts, however, it was held that a creditor who had actual notice (which by statute is there made equivalent to notice) of a previous unregistered conveyance of land by his debtor, for a valuable consideration, could not, by attachment and levy, obtain a title thereto, as against the grantee.[10]

The whole doctrine of the efficacy of notice to supply the place of registration in sustaining a title derived from an unrecorded deed, as against a subsequent purchaser or attaching creditor, rests upon the respective equities of the parties, and the principles of public policy in maintaining the registration laws. It follows that a showing of *bona fides* is incumbent upon both the vendee under the unrecorded deed and the subsequent purchaser.[11] The *bona fides* of the transaction will not be presumed from the fact that there is no finding or evidence upon the subject. It must be made to appear affirmatively.[12] The actual payment of the purchase money must be shown from extraneous evidence. A mere recital in the deed to that effect is not sufficient.[13] And where the vendee claims to have purchased the land by delivering up the note of the vendor, he must prove, as against subsequent creditors, that the note evidenced a real debt.[14]

The important question, from a practical point of view, connected with this subject, is: "What is notice of a prior unrecorded deed?" Say the court in McMechan v. Griffing:[15] "The notice must be either express or implied. As to express notice, it has been uniformly held hat the proof must be clear and unequivocal. 'Suspicion of notice, though a strong suspicion,' says Lord Hardwicke, in the case of Hine v. Dodd,[16] 'is not sufficient to justify the court in breaking in upon an act of Parliament.'"[17] "This notice must be direct and positive, or implied. A notice which is barely sufficient to put a party on inquiry, is not sufficient, nor is a suspicion of notice sufficient."[18] Where a conveyance is made of "all the estate, both real and personal * * * * in law or equity, in possession, remainder or reversion," actual notice of such a deed will not affect a subsequent purchaser with notice, unless it appear that he had notice that the land purchased by him was embraced by the deed.[19] Knowledge of an intent to convey is not notice of the deed in any such sense as to prevent a creditor of the grantor, having such knowledge, from using extraordinary diligence to levy an attachment upon the land before the deed is recorded.[20]

The actual spreading upon the record of a deed which, in consequence of some imperfections in the acknowledgment is not properly entitled to be recorded, will not affect the subsequent purchaser with notice of the conveyance.[21] But the record of a deed which misdescribes the premises, has been held sufficient to put a subsequent purchaser upon inquiry, there being no premises in the county corresponding to the description act-

[7] Trull v. Bigelow, 16 Mass. 406; 8 Am. Dec. 144.
[8] Parker v. Kane, 4 Wis. 1; Snyder v. Sponable, 1 Hill (N. Y.), 567; Wiswall v. McGown, 2 Barb. 270.
[9] Guerrant v. Anderson, 4 Rand. 208; Edwards v. Brinker, 9 Dana, 69; Lillard v. Rucker, 9 Yerg. 64.
[10] Priest v. Rice, 1 Pick. 164; 11 Am. Dec. 156.
[11] Watkins v. Edwards, 23 Tex. 443; McCaskle v. Amarine, 12 Ala. 17; Landers v. Bolton, 26 Cal. 393; Maupin v. Emmons, 47 Mo. 306.
[12] Landers v. Bolton, 26 Cal. 393.
[13] Watkins v. Edwards, 23 Tex. 442.
[14] McCaskle v. Amarine, 12 Ala. 17.
[15] 3 Pick. 149; 15 Am. Dec. 198.
[16] 2 Atk. 275.
[17] See, also, Jackson v. Given, 8 Johns. 107; 5 Am. Dec. 328; Jolland v. Stainbridge, 3 Ves. Jr. 478; Norcross v. Widgery, 2 Mass. 509; Jackson v. Elston, 12 Johns. 452; Emmons v. Murray, 16 N. H. 386; Rogers v. Wiley, 14 Ill. 65; Mills v. Smith, 8 Wall. 27.
[18] Fort v. Burch, 6 Barb. 78.
[19] Mundy v. Vawter, 3 Gratt. 518.
[20] Cushing v. Hurd, 4 Pick. 253; Warden v. Adams, 15 Mass. 233.
[21] Gilbert v. Jess, 4 Wis. 110; and see Watson v. Wells, 5 Conn. 468; *contra*, Landers v. Bolton, 2 Cal. 393.

ually given in the deed.[22] A grantee of land, too, is chargeable with notice of facts recited in a deed which constitutes a necessary part of his chain of title.[23] The requisite notice to supply the place of the record, is not necessarily a knowledge of the entire contents of the deed, but, rather, an explicit notice of its existence; notice that a deed conveying the property out of the grantor had been executed.[24] Nor is it necessary that the subsequent purchaser should be charged with notice of the kind of conveyance made, or its legal effect. It is enough if he knew that his grantor had previously made an unrecorded conveyance of the same property.[25] Where the purchaser knew of a deed containing a reference to a registered title bond, it was held that he was affected with notice of the contents of the bond.[26]

In an action upon a mortgage made to a railroad company and defectively recorded, it appeared that one of the defendants, when he subsequently purchased a part of the mortgaged premises, "had heard that there was a defective railroad mortgage upon them, but did not look for it, because his abstract did not show it." Upon these facts it was held that he must be regarded as having actual notice of the plaintiff's mortgage.[27]

Sometimes a distinction is made as to the source from which the information coming to the subsequent purchaser is derived. "Certainly the vague reports of strangers," says Sharswood, J., "or information given by a person not interested, will not have the effect of notice to the purchaser;[28] but information derived through parties interested, and from a reliable source is different. Although a purchaser may disregard rumors set afloat by those who have no right to intermeddle, he is bound to attend to the admonitions of a party in interest."[29] Thus it was held that where A had heard B say that he had an unrecorded deed for certain lands, it was sufficient to charge A, who had subsequently purchased the lands, with actual notice of the title of B.[30] And where a person, about to purchase property, was told by the recorder that the seller had already given a deed of the property to another person, and that it had been filed for record, but had been taken away before recorded, it was held that this information was sufficient to put him on inquiry;[31] and, although, as seen above, a purchaser is charged with notice of statements made in deeds forming a part of his chain of title, yet he is not affected by a clause in a deed from a stranger to the title, although it may be duly recorded.[32]

Circumstances may exist which should put a party upon inquiry, but which do not amount to constructive notice of the existence of a title. In such cases, if the party make proper inquiry and has no reason to believe that a deed exists, he is not to be charged with constructive notice of an unrecorded conveyance.[33] In Dey v. Dunham,[34] Chancellor Kent held that the notice must be such as, with attendant circumstances, will affect the subsequent purchaser with actual fraud; and that a notice, enough merely to put a party upon inquiry, is not sufficient to break in upon the registry act. In Williamson v. Brown,[35] Selden, J., after thoroughly reviewing the authorities, said: "The true doctrine on this subject is, that where a purchaser has knowledge of any fact sufficient to put him upon inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed to have made the inquiry, and ascertained the extent of such prior right, or to have been guilty of negligence equally fatal to his claim to be considered a *bona fide* purchaser. This presumption, however, is a mere inference of fact, and may be repelled by proof that the purchaser failed to discover the prior right, notwithstanding the exercise of proper dili-

[22] Partridge v. Smith, 2 Biss. 183.

[23] Pringle v. Dunn, 37 Wis. 466, citing Fitzhugh v. Barnard, 12 Mich. 105; Case v. Erwin, 18 Mich. 434; Baker v. Mather, 25 Mich. 51; Howard Ins. Co. v. Halsey, 8 N. Y. 271; Gilbert v. Peteler, 38 N. Y. 165; New v. Wescott, 46 N. Y. 384; Coles v. Sims, 5 DeGex, M. & G. 1; Frost v. Beekman, 1 Johns. Ch. 288.

[24] Wallace v. Craps, 3 Strobh. 266.

[25] Galland v. Jackman, 26 Cal. 79.

[26] Payne v. Abercrombie, 10 Heisk. 161.

[27] Pringle v. Dunn, 37 Wis. 449.

[28] Kerns v. Swope, 2 Watts, 75; Jaques v. Weeks, 7 Watts, 261; Churcher v. Guernsey, 3 Wright, 86; Pitman v. Sofley, 64 Ill. 155.

[29] Mulliken v. Graham, 72 Pa. St. 490; Ripple v. Ripple, 1 Rawle, 390, there cited. Also, Butcher v. Yocum, 61 Pa. St. 168; Maul v. Rider, 59 Pa. St. 167; Hewit v. Clark, 91 Ill. 605.

[30] Mense v. McLean, 13 Mo. 298.

[31] Lawton v. Gordon, 37 Cal. 202. See, however, Hickman v. Perrin, 6 Cold. 135.

[32] Polk v. Cosgrove, 4 Biss. 437.

[33] Rogers v. Jones, 8 N. H. 264.

[34] 2 John. Ch. 182.

[35] 15 N. Y. 362. See, also, Baker v. Bliss, 39 N. Y. 70; Doyle v. Teas, 5 Ill. 202.

gence on his part."[36] This doctrine seems to have been very generally accepted and adopted.[37] In Mississippi, the court say pithily: "Whatever is sufficient to put a party upon inquiry amounts in equity to notice."[38] Whether the subsequent purchaser has made due inquiry is a question of fact for the jury; and with a view to its determination, the information obtained by him may be proved, though it can not be used to bear upon the question whether or not there was such a deed.[39]

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[36] Citing and reviewing Rogers v. Jones, 8 N. H. 264; Flagg v. Mann, 2 Sumn. 554; Hanbury v. Litchfield, 2 Myl. & K. 629; Jones v. Smith, 1 Hare, 43; Tuttle v. Jackson, 6 Wend. 213; Jackson v. Post, 15 Wend. 588; Grimstone v. Carter, 3 Paige, 421; Whitbread v. Boulnois, 1 Yon. & Coll. Ex. 303; Jolland v. Stainbridge, 3 Ves. Jr. 578; Hine v. Dodd, 2 Atk. 275; Jackson v. Valkenburg, 8 Cow. 260; Dey v. Dunham, 2 Johns. Ch. 182.

[37] Hankinson v. Barbour, 29 Ill. 80; Heaton v. Prather, 84 Ill. 330; Parks v. Willard, 1 Tex. 350; Parker v. Cane, 4 Wis. 1; Gress v. Evans, 1 Dak. Ter. 387.

[38] Harper v. Reno, 1 Freem. Ch. 336.

[39] Nute v. Nute, 41 N. H. 60.

PROOF OF FOREIGN LAW.

It is to be observed, in the first place, that the courts will take judicial notice of: 1. The law of nations.[1] 2. The law merchant.[2] 3. The maritime law, so far at least as recognized by the law of nations.[3] 4. The ecclesiastical law, for the purpose of determining how far it is a part of the common law.[4] 5. The courts of a State which has been carved out of another State, take judicial notice of the statutes of the latter State, passed prior to the separation.[5] In accordance with this principle, the Supreme Court of the United States has taken judicial notice of the Spanish laws prevailing in Louisiana before the cession of that territory to this government, and upon which laws titles to land in that State depended.[6] And, in a more recent case, in a circuit court of the United States, the title to lands in Texas being involved, the question having arisen whether the laws of Tamaulipas, in whose limits the premises in question formerly lay, must be proven or could be judicially noticed, it was held by Mr. Justice Bradley, that judicial notice would be taken of them, on the ground that the former laws of a country still affecting its landed estates are to be regarded as domestic and not foreign laws.[7] 6. All courts take judicial notice of their domestic law.[8] And the common law of a State which had no political existence before the Revolution, is the common law as modified and amended by English statutes passed prior to the Revolution.[9] But it is held that, in those States whose colonies were established before the Revolution, with a power to legislate for themselves, English statutes passed after the colonies were thus established, but prior to the Revolution, are not a part of their common law. 7. The State courts take judicial notice of the Federal Constitution, and of its amendments,[11] as well as of Federal statutes.[12] 8. The Federal courts take judicial notice of the laws of the several States composing the national government.[13] "It can never be maintained in the courts of the United States," said Mr. Chief-Justice Taney, "that the laws of any State of this Union are to be treated as the laws of a foreign na-

[1] The Scotia. 14 Wall, 171, 188.

[2] Edie v. East India Co., 2 Burr. 1226; Jewell v. Center, 25 Ala. 498; Bradford v. Cooper, 1 La. Ann. 325; Goldsmith v. Sawyer, 46 Cal. 209.

[3] Chandler v. Grieves, 2 H. Bl. 606n; Maddox v. Fisher, 14 Moore, P. C. 103; Zugasti v. Lamer, 12 Moore P. C. 331; The Scotia, 14 Wall. 171, 188; Taylor on Ev., sec. 5; Wharton on Ev., sec. 208.

[4] Sims v. Marryatt, 17 Q. B. (79 E. C. L.) 292; Roll. Abr. 526; 6 Vin. Abr. 496.

[5] Delano v. Jopling, 1 Litt. (Ky.) 417; Stokes v. Macker, 62 Barb. (N. Y.) 145; Doe v. Eslava, 11 Ala, 1028; Chouteau v. Pierre, 9 Mo. 3.; Ott v. Soulard, 9 Mo. 581.

[6] United States v. Turner, 11 How. 663, 668.

[7] City of Brownsville v. Cavazos, 2 Woods, 293.

[8] State v. Jarrett, 17 Md. 309; State v. O'Conner, 13 La. Ann. 486; Pierson v. Baird, 2 Greene (Iowa), 235; Berliner v. Waterloo, 14 Wis. 378; Springfield v. Worcester, 2 Cush. (Mass.) 52; Division of Howard County, 15 Kan, 194; Dolph v. Barney, 5 Oregon, 191.

[9] Coburn v. Harvey, 18 Wis. 147; Dutcher v. Culver, 24 Minn. 584.

[10] Sackett v. Sackett, 8 Pick. 398, 316; Commonwealth v. Knowlton, 2 Mass. 534.

[11] Graves v. Keaton, 3 Coldw. (43 Tenn.) 8.

[12] Kessel v. Albetis, 56 Barb. 362; Papin v. Ryan, 32 Mo. 21; Morris v. Davidson, 49 Ga. 361; Rice's Succession, 21 La. Ann. 614, 616; Bayley v. Chubb, 16 Gratt. 284; Mims v. Swartz, 37 Tex. 13; Jones v. Laney, 2 Tex. 342; Semple v. Hagar, 27 Cal. 163; United States v. DeCoursey, 1 Pinn. 508; Montgomery v. Deeley, 3 Wis. 709, 712.

[13] Junction Railroad Co. v. Bank of Ashland, 12 Wall. 226, 229; Bennett v. Bennett, Deady, 299, 311; Merrill v. Dawson, Hemp. 563; Smith v. Tallapoosa Co., 2 Woods, 574, 576.

tion."[14] And the principle was authoritatively determined by the Supreme Court of the United States in 1835, when Mr. Justice Story declared: "We are of opinion that the circuit court was bound to take judicial notice of the laws of Louisiana. The circuit courts of the United States are created by Congress, not for the purpose of administering the local laws of a single State alone, but to administer the laws of all the States in the Union to which they respectively apply. The judicial power conferred on the general government by the Constitution extends to many cases arising under the laws of the different States, and this court is called upon, in the exercise of its appellate jurisdiction, constantly to take notice of, and administer the jurisprudence of all the States. That jurisprudence is then, in no just sense, foreign jurisprudence, to be proved to the courts of the United States by the ordinary modes of proof by which the laws of a foreign country are to be established, but is to be judicially taken notice of in the same manner as the laws of the United States are taken notice of by these courts."[15]

In the second place, we notice that the courts will not take judicial notice of the laws of foreign States.[16] As Lord Langdale said in England: "With foreign laws an English judge can not be familiar; there are many of which he must be totally ignorant; there is in every case of foreign law an absence of all the accurate knowledge and ready associations which assist him in the consideration of that which is the English law."[17] And as Mr. Chief Justice Marshall said in this country: "The laws of a foreign nation, designed only for the direction of its own affairs, are not to be noticed by the courts of other countries, unless proved as facts."[18] Neither will the courts of one State take judicial notice of the laws of any other State; and this upon the theory that the separate States, which together constitute the nation, are, as respects their political relations to each other, essentially foreign countries, whose laws must be proven as facts.[19] But it was held in Vermont, at an early day, that the courts would take judicial notice of the laws of sister States.[20] But that doctrine has been overruled in subsequent cases in the same court.[21] In an early case in New Jersey, a similar doctrine was intimated,[22] but the *dicta* in that case have also been overruled in later cases.[23] A similar theory was taken at an early day in Tennessee, and has ever since been maintained in that State.[24] And now, under the Code of the State, the Supreme Court takes judicial notice of all foreign laws and statutes.[25] In a recent case in Rhode Island, the court took judicial notice of a law of the State of New York.[26] In a case in Pennsylvania it was held that a State court, when its judgment would be liable to review by the Supreme Court of the United States in a case arising under the law of a sister State, would take judicial notice of such law.[27] "A judgment of this court," so runs the opinion, "arising out of the Federal Constitution and legislation, would be reviewable in the Supreme Court of the United States, and there the States of the Confederacy are not regarded as foreign States whose laws and usages must be proved, but as domestic institutions, whose laws are to be noticed without pleading or proof. It would be an imperfect and dis-

[14] United States v. Turner, 11 How. 663, 668.

[15] Owings v. Hull, 9 Pet. 507.

[16] Freemoult v. Dedire, 1 P. Wms. 430; Feaubert v. Turst, Prc. Ch. 207; Mostyn v. Farrigas. Cowp. 174; Male v. Roberts, 3 Esp. 163; Smith v. Gould, 4 Moore P. C. 21; Strothen v. Lucas, 6 Pet. 763; Armstrong v. Lear. 8 Pet. 52; United States v. Wiggins, 14 Pet. 335; Damess v. Hale, 1 Otto, 13; Bowditch v. Soltyk, 99 Mass. 138; Owen v. Boyle, 15 Me. 147; Hosford v. Nichols, 1 Paige, 220; McCraney v. Alden, 46 Barb. 274.

[17] Nelson v. Bridport, 8 Beav. 527.

[18] Talbot v. Seeman, 1 Cranch, 38.

[19] Drake v. Glover, 80 Ala. 382; Mobile R. Co. v. Whitney, 39 Ala. 468; Forsyth v. Preer, 62 Ala. 443; Newton v. Cocke, 10 Ark. 169; Hempstead v. Reed, 6 Conn. 480; Brackett v. Norton, 4 Conn. 517: Dyer v. Smith, 12 Conn. 384; Bailey v. McDowell, 2 Harrington, 34; Stanford v. Pruet, 27 Ga. 243; Mason v. Wash, Breese, 39; Irving v. McLean, 4 Blackf. 52; Davis v. Rogers, 14 Ind. 424; Johnson v. Chambers, 12 Ind. 112; Carey v. Cincinnati, etc., R. Co., 5 Iowa, 357; Taylor v. Runyan, 9 Iowa, 522; Shed v. Augustine, 14 Kan. 282; Tyler v. Trabue, 8 B. Mon. 306; Syme v. Stewart, 17 La. Ann. 73; Legg v. Legg, 8 Mass. 99; Hoyt v. McNeil, 13 Minn. 390; Babcock v. Babcock, 46 Mo. 243; Ball v. Consolidated, etc. Co., 32 N. Y. Law, 102, 104; Anderson v. Anderson, 23 Texas, 639.

[20] Middlebury Coll. v. Cheney, 1 Vt. 348.

[21] Ferritt v. Woodruff, 19 Vt. 182; Woodrow v. O'Connor, 28 Vt. 776.

[22] Curtis v. Martin, 1 Pennington, (N. J.) 290.

[23] Van Buskirk v. Mulock, 3 Harrison, 184.

[24] Foster v. Taylor, 2 Overton, 191; Coffee v. Neely, 2 Heisk. 311; Hobbs v. Railroad Co., 9 Heisk. 873.

[25] Hobbs v. Memphis, etc. R. Co. 56 Tenn. 874.

[26] Paine v. Schenectady Ins. Co., 11 R. I. 411.

[27] State v. Hinchman, 27 Pa. St. 479.

cordant administration for the court of original jurisdiction to adopt one rule of decision, while the court of final resort was controlled by another; and hence it follows that in a question of this sort we should take notice of the local laws of a sister State in the same manner as the Supreme Court of the United States would do on a writ of error to a judgment." This case has been severely criticised in Wisconsin.[28] In Kansas it has been held that the Constitutions of sister States will be judicially noticed.[29] And it has been held in the Supreme Court of the United States that, where a State recognizes acts done in pursuance of the laws of another State, the courts of the first State should take judicial cognizance of the said laws so far as may be necessary to judge of the acts alleged to be done under them.[30] A distinction is taken between the written and the unwritten law, and, while the latter may be proven by the testimony of experts, the former can only be shown by the production of the written law itself, duly authenticated. The unwritten law may be proven by parol,[31] while the written law must be produced.[32] In an early case, Mr. Chief Justice Marshall said: "That no testimony shall be received which pre-supposes better testimony attainable by the party who offers it, applies to foreign law as it does to all other facts."[33] Upon this principle the statute itself must be regarded as better evidence of what it contains, than is the testimony of any individual who, though he may know the general purport of the law, may not carry in his mind so minute and exact a knowledge thereof as is often necessary for its proper application. In reference to this distinction between the written and unwritten law as to modes of proof, it is important to observe that the courts have held that, in the absence of evidence to the contrary, it will be presumed that the foreign law is unwritten, and that parol evidence will be received upon this assumption.[34]

While the general rule excludes, in this country, the testimony of witnesses as to the written or statutory law, yet such testimony has been received when the question was, not so much as to the language of the written law, but as to what was the law altogether as shown by its exposition, interpretation and adjudication. In admitting such testimony in Alabama as to the law of Louisiana, the court said: "The exposition, interpretation and adjudication may never have been evidenced by books or writings; but may, nevertheless, have become well understood, as the rule of law deduced by the court from the written words of the Code upon a particular state of facts. Upon such a question, the testimony or opinions of competent witnesses, instructed in the law of that State, may be resorted to."[35] In another case it is held that while the statute of a foreign State can not be proved by parol, yet the construction given to such statutes by the tribunals where they are in force, may be given in evidence by witnesses learned in such laws.[36] And the Supreme Court of Rhode Island has recently permitted a Spaniard, formerly of Havana, to testify that a verbal partnership was valid under the laws of Cuba; that he might state the written law without producing it.[37] The court declared that, in the case of the Spanish colonies, it was difficult to ascertain what their law was without the aid of an expert, their law being composed partly of the various codes of Spain, and partly of the various decrees contained in the *Recopilacion de Indias*, and the various decrees of later date. In the course of its decision the court say: "There are many cases where the evidence of a professional person, or one skilled *virtute officii*, may be much more satisfactory evidence of what the law is, than the mere

[28] Rape v. Heaton, 9 Wis. 328.

[29] Butcher v. Bank, 2 Kan. 70; Dodge v. Coffin, 15 Kan. 277.

[30] Carpenter v. Dexter, 8 Wall. 513.

[31] Baltimore, etc. R. Co. v. Glenn, 28 Md. 287; Heberd v. Myers, 5 Ind. 94; People v. Lambert, 5 Mich. 349; Merritt v. Merritt, 20 Ill. 65; Ennis v. Smith, 14 How. (U. S.) 400, 426; McRae v. Mattoon, 13 Pick. 53; Owen v. Boyle, 15 Me. 147, 151; Tyler v. Trabue, 8 B. Mon. 306.

[32] Zimmerman v. Hesler, 32 Md. 274; Kermott v. Ayer, 11 Mich. 181; Woodbridge v. Austin, 2 Tyler, 364; Danforth v. Reynolds, 1 Vt, 265; Territt v. Woodruff, 19 Vt. 184. McNeill v, Arnold, 17 Ark. 154, 167; Bowles v. Eddy, 33 Ark. 645; Emery v. Berry, 8 Foster, 473; Comparet v. Jernegan, 5 Blackf. 375; Hoes v. Van Alstyne, 20 Ill. 202; McDeed v. McDeed, 67 Ill. 545; Lee v. Matthews, 10 Ala. 682; Ennis v. Smith, 15 How. 400; Spaulding v. Vincent, 24 Vt. 501, 505; Isabella v. Pecot, 2 La. Ann. 387; Bryant v. Kelton, 1 Tex. 434.

[33] Church v. Hubbard, 2 Cranch, 187.

[34] Dougherty v. Snyder, 15 S.& R. 84, 87; Livingston v. Maryland Ins. Co., 6 Cranch, 274, 280.

[35] Walker v. Forbes, 31 Ala. 9.

[36] Hoes v. Van Alstyne, 20 Ill. 202.

[37] Barrows v. Downs, 9 R. I. 453.

exemplification of the exact words of a foreign statute, which the court may not have the necessary knowledge to construe. And it seems to us that the requiring an exemplified copy is pressing the rule of requiring the best evidence to an extent that would often defeat the ends of justice." Chancellor Kent, in an early case, also permitted a Spanish lawyer to testify that a will was executed according to the laws of Cuba, without the production of the written law.[38] And recently, in Pennsylvania, a witnesss was permitted to testify as to the laws of Baden, though his testimony involved a statute.[39] So, in a late case in Maryland, a New York lawyer was held competent to testify, in the absence of opposing proof, whether a sale made by a receiver was made after due public notice and advertisement as required by the laws of New York.[40] In other cases, too, in this country, experts have been allowed to testify as to the law of another State, where a statute and its construction has been involved.[41] But in England the rule is well settled, and has been since 1845, that parol testimony may be received as to foreign law, even though the law be written. Law is considered as a complex resultant of the written law and its interpretation and construction. In Baron De Bode's case,[42] Lord Chief Justice Denman said: "There is another general rule; that the opinions of persons of science must be received as to the facts of their science. That rule applies to the evidence of legal men, and I think it is not confined to unwritten law, but extends also to the written laws which such men are bound to know. Properly speaking, the nature of such evidence is not to set forth the contents of the written law, but its effect and the state of the law resulting from it. The mere contents, indeed, might often mislead persons not familiar with the particular system of law. The witness is called upon to state what law does result from the evidence." The same principle is laid down in Earl Nelson v. Lord Bridport,[43] where the court declares that, although the written law is produced, and due proof made that it has not been repealed, varied or fallen into disuse, and that the words have been accurately translated, "still the words require due construction, and the construction depends on the meaning of the words to be considered with reference to other words not contained in the mere text of the law, and also with reference to the subject-matter, which is not insulated from all others. The construction may have been, probably has been, the subject of judicial decision; instead of one decision, there may have been a long succession of decisions, varying more or less from each other, and ultimately ending in that which alone ought to be applied in the particular case." As Lord Brougham said in the Sussex Peerage Case,[44] "it is perfectly clear that the proper mode of proving a foreign law is not by showing to the House the book of the law; for the House (of Lords) has not organs to know and to deal with the text of that law, and therefore requires the assistance of a lawyer who knows how to interpret it."

When it is desired to prove the language of the written law by the production of the statute, it is evidently necessary that the statute should be authenticated or verified in some manner. In most of the States provision has been made by statute, and books purporting to contain the laws of a sister State, and to be published by authority of such State, may be received as *prima facie* evidence of the laws of such State.[45] And such books have been received in the absence of any statute authorizing it. One of the earliest reported cases on this subject is that of Thompson v. Musser,[46] in which the right to use such a book as evidence of the law was sustained. "I admit," said McKean, C. J., "that this printed copy of an act of assembly, though it purports to have been printed by the law

[38] In the matter of Robert's Will, 8 Paige, 446.

[39] Am. Life Ins., etc. Co. v. Rosenagle, 27 P. F. Smith, 507.

[40] Consolidated Real Estate and Fire Ins. Co. v. Cashow, 41 Md. 59.

[41] Hooper v. Moore, 5 Jones Law (N. C.), 130; Barkman v. Hopkins, 6 Eng. (Ark.) 157.

[42] 8 Ad. & Ellis (N. S.), 208.

[43] 8 Beav. 527.

[44] 11 Cl. & F. 85, 115.

[45] See Inge v. Murphy, 10 Ala. 885; Hanrick v. Andrews, 9 Porter, 9; Allen v. Watson, 2 Hill (S. C.), 319; Simms v. Southern Express Co., 38 Ga. 129; People v. Calder, 30 Mich. 85; People v. Lambert, 5 Mich. 349; Whitesides v. Poole, 9 Rich. 68; McDeed v. McDeed, 67 Ill. 545; Taylor v. Bank of Illinois, 7 Mon. 585; Taylor's Adm'r v. Bank, 5 Leigh, 471; Vaughn v. Griffith, 16 Ind. 353; Paine v. Lake Erie, etc. R. Co., 31 Ind. 283; Merrifield v. Robbins, 8 Gray, 150.

[46] 1 Dallas, 458.

printers of Virginia, is not as good evidence as a sworn copy compared with the rolls or an exemplification under the great seal, but these modes of authentication are likewise inferior to the original law itself. If the plaintiff in error had been sued in Virginia, this printed book of the acts of assembly would then, unquestionably, have been good evidence; and I can discover no satisfactory reason why, as he is sued here, the same evidence should not be received at least *prima facie*" This case was decided in 1789, two years prior to the passage of the act of Congress providing for the authentication of records.[47] But since that act, the same doctrine has been maintained, and in the face of the objection that laws should be authenticated in the manner provided for in that act.[48] And a volume of laws of a foreign government, transmitted by that government to the Supreme Court of the United States, will be admitted as evidence of the laws of such government, in the courts of the United States, without further authentication.[49]

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[47] Rev. Statutes of U. S. (1878) sec. 905.

[48] Kean v. Rice, 12 S. & R. 203; Raynham v. Canton, 3 Pick. 293; State v. Stade, 1 D. Chipm. 303; Danforth v. Reynolds, 1 Vt. 265; State v. Abbey, 29 Vt. 60; Cox v. Robinson, 2 Stew. & P. 91; Poindexter's Exr's v. Barker, 2 Hayw. 173; Hanrick v. Andrews, 9 Porter, 9; Mullen v. Morris, 2 Pa. St. 85; Young v. Bank of Alexandria, 4 Cranch, 388; Biddis v. James, 6 Binney, 321, 327. *Per contra*, Packard v. Hill, 2 Wend. 411; Lincoln v. Battelle, 6 Wend. 475; State v. Twitty, 2 Hawks, 441. See, too, Kinney v. Hosea, 3 Harr. (Del.) 78.

[49] Dauphin v. United States, 6 Ct. of Claims, 221; Rothschild v. United States, 6 Ct. of Claims, 204.

VOLUNTARY ASSIGNMENT — ESCROW — DELIVERY — ESTOPPEL — PLEADING — ALTERATION.

ROBBINS v. MAGEE.

Supreme Court of Indiana, November 29, 1881.

. Where a grantor, by an ordinary warranty deed, without conditions or limitations therein expressed, onveys land to certain grantees named in the deed, without using language indicating that they take as rustees, but at the same time executes an agreement with the grantees which shows that they take as trustees, and as such are to sell the land and apply the proceeds to the payment of the grantor's creditors, the transaction must be regarded as a composition agreement between the grantor and his creditors, and not as a voluntary assignment.

2. Where a deed is placed in the hands of a third party, to be delivered only upon condition, and such party, before compliance with said condition, wrongfully delivers the same, the delivery is without force, and passes no title to the grantee in the deed, and the grantor may assail and overthrow it.

3. To constitute a valid estoppel by conduct, there must be knowledge on the part of the party sought to be estopped, and a want of knowledge on the part of the party relying upon the estoppel.

4. An answer which attempts to plead an estoppel by conduct, must show that the defendant relied upon the plaintiff's representations or conduct, was influenced thereby, and was ignorant of the truth. In pleading an estoppel, the facts must be stated with fullness and certainty.

5. No affirmative defense can be maintained upon a deed which has been fraudulently altered by the party who made the alteration.

6. But one who purchases in good faith from such grantee, without knowledge of the alteration of the deed, and acting upon representations of the grantor in the altered deed, obtains a good title.

Appeal from the Rush Circuit Court.

Adams & Michener, *B. F. Love*, *C. Cambeon* and *Sluth & Study*, for appellant; *Miller & Gavin*, *C. & J. K. Ewing* and *W. B. Wilson*, for appellees.

ELLIOTT, C. J., delivered the opinion of the court:

This action was commenced by the appellants in the Decatur Circuit Court, and the venue afterwards changed to the Rush Circuit Court.

The complaint of the appellants was in four paragraphs. In the first paragraph it was alleged, that the appellant was the owner of certain real estate on the 17th of December, 1871, and of a large amount of personal property; that, on that day, he executed a deed of assignment to Ralph Magee for said real estate, for the benefit of his, appellant's, creditors; that, at the same time, a written agreement was executed by appellant and the appellees; that at the time of said assignment, the appellant was in failing circumstances, and largely indebted to other persons, not parties to the aforesaid agreement, nor included within the list of creditors in the said assignment, and that the said assignment was made under the act concerning voluntary assignments, approved March 5th, 1859. Copies of the deed of assignment and of the agreement executed contemporaneously with it, are set forth. It is charged that the assignment was invalid for the following reasons: It was not made for the benefit of all of the creditors of the assignor; it was not accompanied by a schedule containing a particular enumeration of all the personal property assigned; the schedule was not sworn to before an officer authorized to administer oaths, as required by the act aforesaid; that the deed was not properly acknowledged; that the deed was not recorded according to law, and that the trustees did not take the oath required by statute. The second paragraph alleges, in substance, that the deed of assignment was delivered as an escrow to one Scobey, to be

held by him until all the creditors of appellant had signed the written agreement; that Scobey fraudulently delivered said deed before the creditors had signed the aforesaid agreement. The third paragraph contains allegations in effect the same as those of the second, with the additional averment that the grantees fraudulently altered the same by erasing the word "none," and inserting the word "ten" after the word loan. The fourth paragraph alleges that a mistake was made by the scrivener who draughted the deed; that the mistake consisted in omitting from said instrument a provision that the grantees therein should not sell the real estate therein described for less than $50 per acre, and also in omitting the provision that "this deed shall not take effect until all of Robbins' creditors have signed the written agreement of this date."

Demurrers were filed to those paragraphs, and were overruled as to all except the first.

The questions which first requires our attention, are those arising upon the ruling sustaining appellee's demurrer to the first paragraph of the complaint.

Appellant contends that the transaction of December 17th, 1872, is a mere voluntary assignment, made under, and governed by, the act of March 5th, 1859, and that as the provisions of that act were not complied with, the assignment must be deemed fraudulent and void.

The contention of the appellees is, that the transaction is not to be treated as a voluntary assignment for the benefit of creditors, but as a contract of composition between a debtor and his creditors.

Appellant's argument rests entirely upon his assumption that the assignment was a voluntary one for the benefit of creditors, and, if this is groundless, the whole argument falls. The deed executed by the appellent and his wife is an ordinary warranty deed in the statutory form, and names Ralph Magee and Dana Schultz as grantees. There are no words indicating that the grant is to them as trustees, nor are there any directions as to how the property conveyed shall be disposed of. In short, the deed is an absolute one without conditions, limitations or covenants, save only the general one of warranty on the part of the grantors. The agreement, executed cortemporaneously with the deed, shows that Schultz and Magee were to take the property conveyed as trustees, and, as such, sell it and apply the proceeds to the payment of the creditors of the appellant. We think the transaction must be regarded as a composition agreement between the appellant and his creditors, and not as a mere voluntary assignment. A composition is effected by this agreement with all the creditors; for, by its terms, all are entitled to its benefits who choose to become parties to it. The contract under mention differs very widely from a mere voluntary assignment, for it is the mutual contract of the debtor and his creditors, dependent for its validity upon the assent of all the contracting parties, whereas a voluntary assignment is the act of the debtor himself, and in no way dependent for its validity upon the assent of the creditors. In the one case the assent of the creditors gives the contract force; in the other, their assent can neither strengthen nor weaken the act of the debtor. The act of 1859 uses the term "assignment, and uses it in its ordinary sense, as meaning the transfer of property by the owner. That this is the meaning annexed to the word is plain; for all the provisions of the statute, from first to last, proceed upon the ground that the assignment of the property is the debtor's act, unaccompanied by any agreement of his creditors, or that of any other persons. The statute was not intended to prevent a debtor from making a contract with his creditors, by which his property is conveyed to trustees to be disposed of for the benefit of the debtor as well as the creditors. The distinction between a voluntary assignment and a composition contract has been recognized and enforced by this court since the enactment of the statute concerning voluntary assignments. Consions v. Durflinger, 59 Ind. 27; Senny v. Gale, 28 Ind. 486.

The case of Collins v. Kemp, 29 Ind. 281, is in principle the same as the case in hand. There the debtor conveyed his property by way of mortgage to secure debts due to all of his creditors, and it was asserted that this was an assignment within the act of 1859. The court there said: "It is claimed that the instrument, set out as a mortgage, is by the allegations of the complaint an assignment for the benefit of creditors within the meaning of the act of March 5, 1859, and is therefore void. We hold that it is not an assignment within the meaning of the act." While it is true that the case cited and the one in hand are much alike, it is still true that the latter is much the plainer; for here we have the express agreement of debtor and creditors.

The appellees answered in an answer, to the first and third paragraphs of which demurrers were overruled, and of this ruling appellant here complains.

The first paragraph of the joint answer is addressed to the second, third and fourth paragraphs of the complaint. The allegations of the complaint as to the former ownership of the real estate in controversy, and as to the execution of the deed and agreement as therein stated, are expressly admitted by the answer; and it is there alleged, in substance, that when the said instruments were executed, the appellant was indebted in a sum beyond the value of his property. That his property was in danger of being sacrificed by a forced sale; that to avert this danger, and in consideration of the agreement of the creditors to allow appellant six hundred dollars of property, the said instruments were executed; that Schultz and Magee entered upon the duties of their trust; that in execution of such trust they sold a part of the real estate to the appellee, Steyers, who paid a

valuable consideration therefor; that the said Schultz entered into a written agreement with said appellant, of which the following is a copy, to-wit: "By this agreement is witnessed that we bind ourselves unto Jacob F. Robbins, that if he furnishes a man to advance for him $36 per acre, $100 within twenty days from this date, for the tract of land which Schultz and Magee have contracted to William Steyers this day, and also to repay ten per cent. on the advances made by Steyers, and will accept said Robbins' mortgage for said sum, so that he (Robbins) may have an opportunity to pay it, and retain for two or three years its possession, the legal title thereto shall be conveyed to the said Robbins so that he can mortgage it; but this loan must be secured and the money ready for our use within twenty days from this date, and it shall be ready at the time the title is demanded; and if said Robbins fails to furnish the person to do as indicated within said time, this contract shall be void, and said Robbins is to surrender possession according to his agreement heretofore made with Schultz and Magee. Dated at Greensburg, January 30, 1879. David Schultz, J. P. Robbins, Jacob F. Robbins." That Steyers took possession of the said real estate; that the purchase-money paid by Steyers was all paid to the creditors of the appellant without objection from Robbins; that after the conveyance to Steyers, some persons, to appellees unknown, without their knowledge and consent, caused the deed executed to Magee and Schultz to be altered. It is also averred that the appellant had full knowledge of the payment by Steyers of the purchase-money of said real estate, and all of the allegations of the complaint charging fraud against the appellees are specifically denied. The facts set forth are pleaded as an estoppel. It is contended by appellant's counsel that this answer is bad, for the reason that it does not aver that he did have knowledge that Scobey had delivered the deed to the grantees therein named, in violation of the condition imposed by the grantor when it was placed in his hands as an escrow. The delivery of the deed by Scobey in violation of the condition upon which it was placed in his possession, was not a valid delivery. Berry v. Anderson, 29 Ind. 36; 3 Wash. R. P. 302, n.

The delivery of the deed not having been such as gave it force, no title passed to the grantees, but remained in the grantor. Unless the grantor, by his subsequent acts, had estopped himself to set up the invalidity of his first deed, he had an undoubted right to assail and overthrow it. If he was ignorant of the material and important fact that the deed had been delivered by the person to whom it was intrusted as an escrow, in violation of the trust and authority conferred, then the doctrine of estoppel can not justly apply to his subsequent conduct, as developed by this answer. Appellant was neither negligent nor imprudent in acting upon the belief that the condition imposed when the deed was placed in the hands of Scobey had been complied with before its delivery to the grantees. The doctrine that a person who does an act in excusable ignorance of a material fact is not thereby estopped, is founded in sound reason and is well sustained by authority. In Fletcher v. Holmes, 25 Ind. 408, the subject here under discussion received a full and careful consideration, and it was said: "For the prevention of fraud, the law will hold a party concluded by his own act or omission. Surely this can have no application where everything was equally known to both parties, or where the party sought to be estopped was ignorant of the facts out of which his rights sprung."

It was said in the case of Long v. Anderson, 62 Ind. 537, that: "In the second and third paragraphs of his answer, the appellant has endeavored to defend against this latter breach only of the alleged warranty, by showing and stating certain facts which, if true, tended to estop the owner of said real estate from asserting any ownership of a title to said property. Each of said paragraphs of answer was bad or insufficient on appellee's demurrer thereto for want of sufficient facts, for the reason that it was not alleged in either of the said paragraphs that the owner of said real estate was fully apprized of his legal rights as such owner." In Greensburg Co. v. Sidener, 40 Ind. 424, Buskirk, J., speaking for the court, said: "To constitute a valid estoppel by conduct, there must be knowledge on the part of the party sought to be estopped, and a want of knowledge on the part of the party relying upon the estoppel."

Of the many recent cases approving the doctrine of Fletcher v. Holmes, we cite Bach v. Lendel, 72 Ind. 475; Hedson v. Dinsmore, 68 Ind. 391; Stewart v. Hartman, 46 Ind. 331.

Appellees, in replying to the argument of appellant's counsel, assert that as the appellant took an active part in negotiating the sale to Steyers, the rule that knowledge must be shown does not apply, and we are referred in support of this position to Barnes v. McKay, 7 Ind. 301. It was said in that case that "It may be that appellant was ignorant of her legal rights to the tract in controversy; but, although she may have been ignorant of her rights, she can not avoid the effect of her assurances to an innocent party that he might safely buy; for by them she assumed to know the facts on which her title rested." If this were conceded to be a correct statement of the law, it would yield appellees no support, for these, among other reasons: 1st. The answer is by all of the defendants, the grantees in the original deed, and the parties to the original contract. As to those grantees and parties, it is certainly not a good answer, for they were chargeable with notice of the transaction in which they were active participants. An answer bad as to a part of the defendants answering in it, is bad as to all. 2d. The answer does not aver that appellant made any representations upon which Steyers, the purchaser, acted. It is not intimated that Robbins

ever gave Steyers any assurances concerning the title of Schultz and Magee. It is not even shown that appellant took any part at all in the negotiations which resulted in the purchase. 3d. The answer does not show that Steyers relied upon the conduct of the appellant, nor that he was at al influenced by anything said or done by the former. 4th. It does not show that Steyers was not a purchaser with full knowledge of the circumstances attending the surrender of the deed by Scobey to the grantees therein.

It is insisted by appellees, that as the answer shows that Robbins received part of the first payment of $1,000 made by Steyers, the purchaser, that he is estopped to question the title of such purchaser. The allegation upon this point is as follows: "And a portion of which $1.000 was paid to said Jacob F. Robbins." The pleader does not aver how much of the money was paid appellant; whether it was one cent or one dollar, the court is not informed. In setting up the defense of estoppel, facts must be stated with fullness and certainty.

In Bach v. Lendell, *supra*, the court quoted and approved Lord Coke's famous saying: "Every estoppel, because it concluded a man to allege the truth, must be certain to every intent, and not to be taken by argument or inference."

A party who relies upon an estoppel should, in his pleading, state all material facts, and so state them that the court can decide, as a matter of law, that they conclude the adverse party from setting up the truth. Under the Code the defense of estoppel must be specially pleaded, and so pleaded as to constitute a complete bar to the cause of action stated in the complaint. Ostram v. Wood, 29 Ind. 177; Pomeroy Rem., sec. 712. The court could not, in an ordinary case, presume, under the allegations of this answer that anything more than a mere nominal sum was paid, and certainly the court can not presume that the sum paid was material or important where the defense is one of such a character as that which the answer attempts to interpose to the appellant's complaint. Retention of money received, where a man is entirely ignorant of his rights, ought to be shown to be of such a material character as to equitably preclude him from averring the truth. Terrell v. Grinnell, 20 Iowa, 363. The inference in cases of estoppel is against, and strongly against, the party who pleads it. He must state all the elements which are necessary to create a valid estoppel. Nothing can be supplied by intendment in favor of an alleged estoppel. A defendant who seeks to shut out the truth must plead all the material facts with certainty. In such cases it is the pleader's duty to keep in mind the rules applicable to such defenses, and to frame his answer in accordance with their arguments, strict and exacting though they are.

Another allegation of the paragraph of the answer under mention requires brief notice, and that is the following: "That the plaintiff, with full knowledge that the deed and contract mentioned in the complaint had been delivered to Schultz and Magee, rented of said Schultz and Magee said lands, and accepted the same as their tenants for one year." The infirmity in this branch of the answer is that it neither denies nor avoids the charge of the complaint that the deed was delivered in violation of the condition upon which it was placed in Scobey's custody. The answer confesses, but does not avoid. The question was not as to whether there was a delivery to the grantees, but whether it was a valid one.

The third paragraph of the joint answer professes to answer the third paragraph of the complaint. The purpose of the pleader evidently was to state such facts as entitled the appellees to affirmatfve relief by securing the reformation of a mistake in the deed executed by the grantor. The answer, however, is addressed to the whole of the third paragraph of the complaint, and professes to be an answer to the cause of action therein stated. It does not fully answer the paragraph of the complaint to which it is addressed; for no answer at all is made to the allegation that the grantees had fraudulently altered the deed. That allegation is neither denied nor avoided. It is a familiar rule of pleading that an answer professing to answer an entire complaint, and answering only a part, is bad on demurrer.

In order to escape the force of this rule, the appellees argue that the rule, that a material alteration vitiates an executory contract, does not apply to executed contracts. It is said by counsel that, "After the title has once passed under an executed contract, it is not divested by any subsequent alteration or destruction of the deed. After delivery it has performed its full office." If it were fully conceded that the law is that. where a deed has been executed and title vested, its subsequent alteration would not divest title, appellees could take no benefit therefrom in this case; for the question here is not whether a vested title shall be disturbed, but the question is whether a grantee can ground a right of action or defense on a deed which has been by him fraudulently altered? The appellees are grounding this claim to affirmative relief upon a deed which, according to the undenied allegation of the complaint, was fraudulently altered by them. There is a broad distinction between a case where a party asserts a right to have judicial assistance, and founds his right upon a deed wrongfully altered in a material part, and a case where his adversary seeks to divest a vested title upon the grounds that, subsequent to the time such title vested, the grantee wrongfully altered the deed. Professor Greenleaf says: "If the estate lies in grant, and can not exist without a deed, it is said that any alteration by the party claiming the estate will avoid the deed as to him, and that therefore the estate itself, as well as the remedy upon the deed, will be utterly gone." 1 Greenl. on Ev., sec. 568. With the first branch of Professor Greenleaf's proposition we have here no direct concern

but the latter, if correct, exerts an important influence upon the case.

If all remedy upon an altered deed is, as the author quoted says, utterly gone, then the appellees clearly had no foundation upon which to claim the affirmative relief sought by the answer under examination. The case upon which appellees so confidently rely (Woods v. Hildebrand, 46 Mo. 284; s. c., 2 Am. R. 513), recognizes the doctrine that a deed which has been fraudulently altered will not furnish grounds for judicial aid. Cases are there cited which expressly declare this doctrine, among them the following: Withers v. Atkinson, 1 Watts, 236; Cherley v. Frost, 1 N. H. 145; Alexander v. Hickey, 34 Mo. 496. The answer is without any support at all, unless the deed be deemed to entitle the appellees to the relief sought. To promise the appellees to secure the relief sought, would be to furnish them a remedy upon an instrument which they themselves had fraudulently altered, and would be allowing them to enforce a right dependent entirely upon a contract which, by their own wrongful act, they had so changed as to make it essentially different from that which the parties actually executed. It has been often held that no action or defense can be maintained upon an instrument which has been altered in a material part, and upon the same principle it must be held that no affirmative defense can be maintained upon a deed which has been fraudulently altered by the party by whom the alteration was made. Dietz v. Harder, 72 Ind. 208; Hamilton v. Wood. 70 Ill. 306; McCoy v. Lockwood, 71 Id. 319: Collier v. Haugh, 66 Id. 456.

We may remark, by the way, that there are very many cases to the effect that any fraudulent alteration of a deed made by the grantee will avoid it, whether the alteration is a material or an immaterial part. 1 Greenl. on Ev., sec. 568, n. That question, however, is not here directly presented.

In addition to the joint answers filed by the appellees, separate answers were also filed by Steyers and Magee. It is insisted that the court erred in overruling the demurrer to the second paragraph of the separate answer of Steyers. This paragraph alleges that a mistake was made in describing the lands intended to be conveyed by the scrivener who drew the deed executed by the appellant to Magee and Schultz; that this mistake was afterwards corrected by and with the consent of the appellant, and facts are also pleaded clearly showing that there was a mistake in the description which the appellee Steyers was entitled to have corrected. It is also alleged that Robbins knew of the sale made by Magee and Schultz to him, Steyers; that thereafter the appellant contracted to buy said land within twenty days from the date of said contract at the same price at which it had been sold to Steyers; that said Robbins endeavored to loan money to pay for said land, and that he failed to do so; that thereafter the said Steyers paid in full for said land without any knowledge that said deed had been delivered as an escrow, and without any knowledge that any alteration had been made in said deed; and that the said Magee and Schultz, with the knowledge and consent of said Robbins, conveyed the land to him, Steyers, and put him in possession thereof. The answer ought, perhaps, to be made more certain and definite, but we think there is enough in it to show that Steyers purchased in good faith, and for a valuable consideration, the land in controversy; and that the appellant confirmed and ratified, so far as concerned Steyers, the delivery of the deed by Scobey. It certainly does show that appellant caused the description in the deed to be corrected, and that by his active participation in the transaction he induced Steyers to believe that Schultz and Magee had a perfect right to convey the land in controversy. In our opinion, such acts were done by the appellant as entitled the purchaser to act upon the belief that the trustees were not only conveying said land under a valid deed, theretofore executed by the said appellant, but also that they were doing it at his request. The facts stated in this answer are not only essentially different from those stated in the joint answer of all the appellees, but the answer is the separate one of a *bona fide* purchaser acting upon the conduct of appellant, whereas in the joint answer there was included the grantees, who were expressly charged with the fraudulent alteration of the deed, and with wrongfully procuring its surrender to them. The facts stated in this paragraph of Steyers' answers shows, not only that the appellant enabled the person to whom the deed was entrusted to do that which appellant now denounces as a fraud, but it also shows that he actively assisted in inspiring the purchaser with a belief that such person at the time his attorney and agent, and the grantees to whom the deed was delivered, were doing that which he, appellant, desired and authorized them to do.

Of the many points argued upon the error assigned upon the ruling denying a new trial, we deem it necessary to consider only a few. The appellant complains of this instruction.

It was competent for the plaintiffs to prescribe the terms on which they would execute and deliver the deed to Magee and Schultz; but if they agreed on terms with the creditors and trustees, and if these were performed by the latter, and the deed was then delivered by Scobey, it took effect as a conveyance, although secret instructions may have been given to Scobey to hold the deed until other conditions, never suggested to the creditors or trustees by the plaintiffs or Scobey, should be performed.

The complaint is groundless. Secret instructions will not affect third persons who rely upon the open conduct and visible acts of a party. A man can not, by secret instructions, avoid the effect of conduct open to the observation of those with whom he deals.

The second instruction told the jury that the written agreement should be deemed to express

all the conditions upon which the deed was to take effect, unless appellees had shown some mistake therein. This was right. Where parties commit their agreement to writing, the written instrument is to be held to correctly express all the terms of the contract, unless a mistake therein be shown by the party alleging the agreement is not properly expressed by the writing.

The third instruction declared that if there was no mistake in draughting the written instrument, then the appellant would have no right to defeat the appellees by showing that he had given Scobey private instructions not to deliver the deed until all the creditors had signed the agreement.

This instruction was properly given. If the written instrument correctly expressed the contract of the parties, appellant could not render its terms ineffective by oral instructions privately given his attorney and agent, for such the evidence shows Scobey to have been. In subsequent instructions the jury were clearly and fully informed as to the effect of a mistake in the written instrument, and the question whether there was, or was not, a mistake, was properly submitted to the jury as a question of fact in very clear and accurate language.

We do not find it necessary to prolong this opinion by discussing in detail the instructions given by the court upon the subject of a mistake in the description of the property conveyed by appellant, nor to give to the instructions asked by the appellant, and refused by the court, are not correct statements of the law, while those given by the court correctly express the principles of the law governing the question. A mistake in the description of property intended to be conveyed by deed may be corrected as between the original parties. The authorities cited by appellant to the effect that mistakes in wills will not be corrected, have no application whatever to deeds.

There is a plain and well-defined distinction between mistakes in a deed, and mistakes in wills. The rules which obtain in the case of wills, have no force whatever in cases of conveyances by deed.

In several of the instructions asked by appellant the doctrine is affirmed that, unless he had notice of the delivery of the deed by Scobey, he was not estopped by acts subsequently performed by him. We think that the court did not err in refusing these instructions, for the same principle is declared very fully and clearly in the instructions given by the court. Knowledge, as we have already said in discussing the pleadings, is often a matter of vital importance where an estoppel is relied upon as constituting a defense, or as creating a right of action. The court, in stating the law to the jury in its own instructions, did not omit to direct attention to this important element of an estoppel *en pais*. We have not discussed many questions argued by counsel, for the reason that for the errors pointed out there must be a reversal, and it is not likely that these questions will again arise.

Judgment reversed.

CONSTITUTIONAL LAW — DISTINCT AND INDEPENDENT PROVISIONS.

POWELL v. STATE.

Supreme Court of Alabama, January, 1882.

Where of two provisions contained in a statute, one is constitutional and one is not, the rule is that if they are distinct from each other and capable of separate enforcement, the sound one is to stand and the unconstitutional one to fall. Otherwise, if they are mutually interdependent in their character so that one can not be enforced without the other.

SOMERVILLE, J., delivered the opinion of the court:

The indictment in this case is framed in full accordance with the requirements of section 4806 of the present Code, relating to the retailing of spirituous liquors. The only averment requisite is, that "the defendant sold vinous or spirituous liquors without a license and contrary to law," and the statute expressly provides that this is sufficient to cover "all the violations of special and local laws, regulating the sale of spirituous liquors within the place specified." Code, 1876, sec. 4806; Block v. State, MS. December Term, 1880; Ulmer v. State, 61 Ala. 208; Acts of 1880-81, pp. 154-159.

The indictment charges the defendant with the violation of a local law, by selling spirituous liquors within five miles of Rehoboth Church in Crenshaw County, contrary to the provisions of an act of the General Assembly, approved March 1, 1881. Acts 1880-81, pp. 154-56.

The constitutionality of this act is assailed chiefly on the ground that it is violative of the commercial clause of the Federal Constitution which confers on Congress the power to regulate commerce among the several States. Const. U. S., art. 1, sec. 8, sub. div. 3.

The first section of the act in question provides that it shall be unlawful for any person to sell, give away or otherwise dispose of any vinous, spirituous or malt liquors or intoxicating bitters or beverages within certain prohibited limits which are specially described, including, among others, the area within five miles of Rehoboth Church, in Crenshaw County. Then follows a proviso in these words:

Provided, That this act shall not be so construed as to prevent the use of wines for sacramental purposes or to abridge the right of any person from giving one or more drinks to any person at his or her private residence, and that it shall not prevent the sale of domestic wines in quantities of less than one quart manufactured from grapes grown in this State, in which no alcoholic or spirituous

liquors were used in the manufacture thereof; *provided further*, that if any person or persons have taken out license for the year 1881, the license money shall be refunded for the unexpired term of such license by the proper authorities." Acts 1880-81, pp. 155, 156.

It is plain that the only discrimination in the operation of this act is against wines or vinous liquors manufactured from grapes grown in other States than Alabama. There is no discrimination, or hostile legislation against the other foreign liquors, spirituous, malt or alcoholic. These, whether foreign or domestic, are placed upon the same exact terms of commercial equality, and are accorded equal facilities in traffic. It may be that this legislative discrimination is invalid so far as concerns wines imported from other States, under the principle decided in Welton v. State of Missouri, 91 U. S. 275, which was followed by this court in Vines v. State, decided at the December term, 1880. This point, however, we do not decide.

It is sufficient for us to say that, conceding the act in question is unconstitutional so far as concerns this particular feature of the proviso, the rest of the law is unaffected by it. and must be permitted to stand on the clearest principles of construction. It does not matter that the objectionable and valid parts of the statute are in the same section of the act. If they are perfectly distinct and separable, and are not dependent the one on the other, the courts will permit the one part to stand, though the other may be expunged as unconstitutional, provided effect can be given to the legislative intent. But where the provisions are all connected in subject-matter, depending on each other, operating together for the same purpose, or otherwise so connected together in meaning that it can not be presumed the legislature would have passed the one without the other, the constitutional invalidity of the one part will vitiate the other, and both must then fall together. Cooley on Const. Law, 177-178; Allen v. Louisiana, 103 U. S. 80; Lowndes County v. Hunter, 49 Ala. 507.

We think, under these principles, that, although the act be inoperative so far as it discriminates against imported wines, or in favor of domestic wines, as the case may be, the remainder of the act is not necessarily unconstitutional, but may be permitted to stand. The authority of Tierman v. Rinker, 102 U. S. 123, we think fully sustains this construction.

The defendant is charged specifically, under the proof made, with selling one pint of whisky. The evidence introduced by the State had no reference to the sale of wines of any character by him, domestic or imported. The act proved comes within the influence of that portion of the law which prohibits the sale of spirituous or alcoholic liquors, and the validity of which remains unimpaired.

It is immaterial that the defendant had obtained a license to engage in the liquor traffic, and was doing business under it at the time of the passage of the act under consideration. Such a license was a mere permit, revocable at the option of the State. It was in no sense a contract between the licensee and the State within the meaning of the Federal Constitution, which prohibits the States from passing any law impairing the obligations of contracts; or within the meaning of a similar clause in our own State Constitution. It is settled by the vast weight of authority that such licenses can be revoked by the legislative department at pleasure. Cooley's Const. Limitations, 282-283, note 2 and cases cited. Fell v. State, 20 Am. Rep. 83; Boyd v. State, 94 U. S. 645, and authorities there cited.

The judgment of the Circuit Court is affirmed.

ATTORNEY AND CLIENT—AUTHORITY TO MAKE COMPROMISE.

MACKEY v. ADAIR.

Supreme Court of Pennsylvania, November 21, 1881.

The authority of an attorney does not extend to the compromising of a suit, in execution of which arrangement deeds to land must be made by his client.

Error to the Court of Common Pleas No. 2 of Allegheny County.

Rodgers & Oliver, for plaintiff in error; *Slagle & Wiley*, for defendant in error.

TRUNKEY, J., delivered the opinion of the court:

R. W. Mackey and others brought ejectment against the City of Allegheny and the heirs of John Irwin, for a tract of land, the whole of which was claimed by the city, and a defined part by Irwin's heirs. At the trial, the respective attorneys for the plaintiffs and for the heirs of Irwin, in order to compromise the question between them, agreed that a verdict should be entered in favor of said heirs for the land lying east of a specified line; and if the plaintiffs should recover the land not included in said Irwin's claim, they should release to said Irwin's heirs all their interest in the land east of said line, and said heirs should release to the plaintiffs all their interest in the lands west of said line. It was intended to fix a division line between the parties, in case the plaintiffs should establish title to any part of the land adjoining Irwin's claim, and in case of their failure, not to conclude Irwin's heirs as to their title or the extent of their claim against other parties.

The court instructed the jury that the agreement is binding upon Mackey's heirs, although he was not present and did not know of it at the time, and, after the trial, may have said he repudiated it; and this ruling constitutes the alleged error.

An attorney at law has very extensive powers

and may do those things which pertain to the conducting of the suit. Unless otherwise expressly instructed by his client,he may use his own judgment in selecting the form of action, and,in shaping the issue, also whether it shall be tried by a jury, by the court, or some other tribunal provided by law. On a mere question of boundary, where title is not involved, in open court, he may agree to its submission to the final determination of arbitrators. Evars v. Kamphaus, 9 P. F. S. 379. He may refer his client's cause to arbitrators with an agreement that the award shall be final; but the client may revoke the submission, and, in a proper case, he may have relief by application to the court. Wilson v. Young, 9 Barr, 101. In Pennsylvania, from an early day, arbitration has been a favorite mode of trial, and it may beimplied by the relation that the attorney has authority to make such agreements for reference; but it does not follow that he can make compromise agreements for his client, or settle a boundary himself.

An attorney has no authority to make a compromise by which his client shall take land instead of money. Huston v. Mitchell, 14 S. & R. 307. Where the attorneys of the respective parties make an agreement in the form of an award, settling an ejectment, it will not authorize judgment accordingly. Stokely v. Robinson, 10 Cas. 315. In that case Woodward, J., held that counsel have no power to compromise their client's case, without the client's authority or sanction.

Here, the agreement is a compromise, and provides for deeds of release or assurance to be made by the clients. It is doubtful whether oral authority would enable an attorney to make such a contract respecting land, though if the client were present at its making, or afterwards recognized and acted upon it, he would be bound. It was not in the course of the conduct of the suit, nor could such agreement be anticipated by the client as likely to be made in any issue of fact or of law, or in any known mode of trial. Authority to make it can not be inferred from the relation. No precedent has been cited in this State, or elsewhere, which sustains a compromise of this nature, by an attorney without his client's authority, or subsequent ratification, and we are of opinion that it would be dangerous to clothe the attorney with such power over his client's property.

Judgment reversed and *venire facias de novo* awarded.

CORRESPONDENCE.

DIGESTING AND INDEXING.

To the Editor of the Central Law Journal:

Some sensible lawyer said "that it was one thing to know law,and quite another to know how to find it." An index has ever been an important part of law books, but its value has been of late years immensely enhanced by the flood of law treatises, which have poured themselves upon the profession. From an experience derived from editing several law books, I propose to throw out several suggestions touching the proper manner of framing an ndex.

In the first place, it ought to be established as an inflexible rule to use the noun as the initial word, and not the adjective. Thus: Actions, Civil; Actions, Criminal—not Civil Actions or Criminal Actions; Practice, Civil, not Civil Practice; and subordinate nouns should be made to yield to a generic term; *ex. gr.*, Indictment ought to be a subdivision of Pleading, Criminal; Declaration or Complaint, of Pleading, Civil. Again, Husband and Wife ought to be surrendered to Marriage. This is not with a view to the exclusive use of the noun; but because there are so many fewer nouns than adjectives, the memory is not so heavily taxed, the range of recurring thought is narrowed. The subordinate nouns are to be inserted under the generic term as subdivisions or cross-references, and the adjectival expressions are to be used as cross-references. Thus, take the word Fiduciary. This term embraces Administrators, Executors, Guardians and all manner of trustees; so under that head all the law, particularly applicable to those subdivisions especially, would follow under respective subdivisions. Under the letter A the word Administrators should appear with the words added, see Fiduciary. So with the others. Take Marriage—under that, Divorce, Alimony, Separate Estate. With full cross-references this plan must work well. It drills the mind in a certain direction as, suppose the attorney wishes to find a principle generally applicable to Fiduciaries, but especially to Guardians, he can not be misled. For, if he looks under the special heading or cross-reference of Guardian, he will find the words see Fiduciary.

The next time he will probably look at once for the generic term instead of the specific one. The next great aid in indexing is the free use of catch-words. A criminal action for stealing fish, the word fish is fastened in the memory, but under a general heading Crimes, although the point will be eventually found if you have the catch-word "Fish" see Crimes. The principle is found in a moment.

And in the great majority of cases some catch-word may be eliminated. What lawyer's mind on hearing, however incidentally, the expression "Trespasser, *ab initio*," does not recur to the six Carpenter case; "*Procul*,etc.,"to Collins and Blantern, "day-book," "pass-book" to Lord Torrington's ease,"man-midwife" to Higham v.Ridgway, or "Confederate money" to Thorrington v. Smith. Words are valuable to express thoughts and connect thoughts, or to produce recurrence of thought, commonly termed refreshing the memory. Another aid is the use of cant terms. Take, for example, the law as to summary proceedings in ejectment, before a trial justice. Now the lawyer may think he will find the desired law under

Landlord and Tenant, Ejectment, Justices, Jurisdiction, etc.; but the cant term for such a proceeding is "bush-court." He looks there and is referred to "see Proceedings under the Landlord and Tenant Act."

There is a decision, we will say, about a telegram, in which the words "you bet" or "don't you forget it," are used. The lawyer may remember perfectly that there was a decision involving these words, but how much better instead of requiring him first to look for the cross-reference, Telegram, then by reference to Contract, sub-division No. —, to look for "You Bet," see Contract, etc. As applicable to indexing the law of defamation I would suggest, not only the employment of the words, but the addition after, of the words, "actionable" and "non-actionable," "may be, criterion," etc., etc. *Ex gr.* "All Watts' gals are big," "may be *criteria*," giving page of volume. "Daffa Down Dilly," when actionable as applied to an attorney, p. —. This I suggest in addition to inserting same under head of Defamation. What more assisting to the memory than "Ku Klux," etc.

I would also recommend the liberal citation of maxims.

A lawyer gathers in a vast amount of trash in a very short space of time, under the title "*utile per inutile;*" a vast amount of dirt under the titles, "*ex turpi causa*," or "*ex dolo malo*," or "*procul, o! procul*," etc., or "*in pari delicto*;" a vast amount of ignorance under that of "*ut res magis*;" of piety under that of "*actus Dei*;" of "airy nothings" under "*de minimis*," etc.

I would also recommend that under the titles, "Constitution U. S.," and Constitution State of ——" reference be made as to the construction of the several articles and sections to the pages in the volume.

The same as to "Statutes," etc. Without intending to repeat, let all such headings as Administrators, Adultery, Affidavit, Agreement, Alimony, Amendment, Answer, Assignment, Bills of Lading, Certiorari, Cities, Clerks and many others, be used only as cross-references, reserving on the guiding principle already stated such apparent subdivisions as Advancement, Affray, Agency, Appeal, Arrest, Assault, Attachment, Attorneys, Bankruptcy, Bastardy, Boundary, etc. It is astonishing how little our indexers have availed themselves of a great many good old words, such as Fiduciary, Alibi, etc., and coined words such as Betterments, Contractee, Distributee, Cablegram, Licensee, and the like, and why they do not coin words as needed, such as Addressee (party written to), Wiree (party telegraphed), Homesteader, Usuree, etc.

I throw out the foregoing as hints to aid in the framing of indexes, hoping that if this article shall have no other, it may have the effect to stimulate our authors and editors into some more zeal than hereto displayed in this branch of book-making.

Charlotte, N. C. W. H. BAILEY.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*

QUERIES.

9. A says to B: "Mr. C has had intercourse with you and he has got the clap, and I can prove it." C brings an action for slander against A, and in his count declares that, by these words A, the defendant, accused him of adultery. B was a married woman, C an unmarried man at the time the words were spoken, and no one was present or heard the words except A and B. Can this action be maintained? Where has such a case been decided? Is it slander? Why? A SUBSCRIBER.

Worcester, Mass.

10. In 1873, A owned two houses, Nos. 62 and 64, Columbus Avenue, Boston, each valued at $25,000. In that year, he gave B a mortgage on both houses for $30,000, which was duly recorded. He afterwards, in the same year, gave C a second mortgage on No. 64 for $5,000. Being close for money, after the panic in 1873, he sold D No. 62, subject to the mortgage for $4.800 cash. C afterwards, in 1877, foreclosed his mortgage and sold the lot No. 64 to E for $200, who immediately reconveyed the same to him. In 1879, both C and D being in possession of lots 64 and 62 respectively, B foreclosed his mortgage, sold both houses and realized $4,800 over his mortgage. Both C and D now claim the surplus, and B will probably be compelled to bring interpleader. To whom should the $4,800 be given? Cite authorities.

Boston, Mass. B.

QUERIES ANSWERED.

Query 2. [14 Cent. L. J. 38.] A conveys land to a duly organized corporation, having authority to buy, hold and convey real estate under the laws of Massachusetts. The conveyance is by warranty with the usual covenants. The corporation decides to settle up its affairs, and is duly dissolved by legislative enactment. By a mistake in settling up its affairs the land purchased from A is never sold or conveyed. The land in question has become valuable, and the question is: "Who has the title to it?" Does it belong to the original grantor A, the individual members composing the dissolved corporation, or to the Commonwealth? To whomsoever it belongs, how can the claimant secure a legal title?

Boston, Mass. G., C. & A.

Answer. Assuming the corporation to be a joint-stock company, the principles which govern a common-law partnership are, in general, applicable to joint-stock companies, whether incorporated or not. Ketchum v. Bank of Commerce of New York. 3 Amer. L. Reg. (O. S.) 145. According to the laws of some States, the property of a partnership, or corporation, is held to be a joint estate; in others, an estate in common. Whether the property be personal or real, or the corporation in question was organized according to the laws of Massachusetts, the title must be settled by the same State laws, if any apply; if not, upon general principles supported by the decisions of other State courts, if any; if no authority extant applies, then general principles must prevail in a court of chancery. North Carolina and Louisiana they hold to the old English doctrine that

real estate purchased with partnership funds makes the members of said partnership, or corporation, joint-tenants; while the corporation exists, the interests are joint; and, while such relation continues, the property must be conveyed by joint deed, or a division made by a court of chancery, by either party filing a bill of partition. Baird v. Baird, 1 Dev. & Batt. Eq. Rep. 524; Skillman v. Purnell, 3 La. 194; 14 La. 200. It will be observed that a joint estate, as above, depends upon the existence of the corporation; t does not state what the relation of the members would be, or what their interests would be should it be dissolved. In Delany v. Hutchinson, 2 Rand. (Va.) 183, it was held that real estate purchased by partners, or memberf of a corporation, for company purposes, to be, both in law and equity, an estate in common. Therefore, a surviving partner can have no other claim against the real estate held in company than any other creditor has; also that the surviving members of said corporation have no other claim than the heirs of the deceased members (the corporation now spoken of is dissolved by death of one partner; when a corporation is dissolved and their property, which was joint while operating together, was not disposed of, it then becomes an es tate in common.) See Coles v. Coles, 15 Johns. 159; Smith v. Jackson, 2 Edwards, 28; The Supreme Court of Massachusetts, in Goodwin v. Richardson, 11 Mass. 469. Having settled the question as to what kind of an estate the one in question is, we will next look for some rule of law or equity to govern the title to estates in common, which will give a simple answer to the above query. No one of them can convey by metes and bounds a part of the estate. Primm v. Walker, 6 Am. Law Reg. (N. S.) 255. In England and in this country, a right of partition is incident to all real estate held in joint tenancy or tenancy in common. Wood v. Little, 2 Am. Law Reg. (O. S.) 353. On partition in equity the court will dispose of all questions between the parties in relation to the land, and afford complete relief. Scott v. Guernsey, 11 Am. Law Reg. (N. S.) 132. The and need not be divided equally, but the value must be equal; then each may buy of the other his interest and give or obtain title by quit-claim deed; or they may severally or jointly quit-claim to a stranger. As the wives of each would have a dower interest in each several husband's interest in such estate in common, if all parties interested join with their wives in a conveyance, they will pass as good a title as they ever had under their charter.

THOS. H. GIRARD.

Grand Rapids, Mich.

WEEKLY DIGEST OF RECENT CASES.

ACTION—SEPARATION OF DISTINCT CAUSES OF ACTION.

1. Where a plaintiff has several distinct causes of action, he may elect to sue upon one, or any one of them he chooses, and he has the further election to unite in one suit, under certain restrictions, several causes of action. 2. Where a note is given, payable in two or more years, with interest annually, or semi-annually, the holder may, at the end of each year, or half year, sue and recover the interest, and this will be no bar to a suit on the note when due. *Dulaney v. Payne*, S. C. Ill., January 16, 1882.

ADMINISTRATOR AND EXECUTOR—ERROR OF JUDGMENT.

A died, having previously pledged certain shares of stock to a broker in good standing as collateral for a loan. These shares stood in the broker's name. A's executors had no means in their hands to pay the loan without selling valuable securities held by testator, which he had specifically bequeathed. They therefore allowed the stock to remain in the broker's name, receiving from him the dividends thereon, less the interest on the loan. Subsequently the broker died, and it was then discovered that he was insolvent, and had pledged the stock as collateral for loans to himself: *Held*, that the executors, having included the stock in their appraisement, were entitled to credit therefor in their account. Their conduct was merely an error of judgment, and was not evidence of such negligence amounting to fraud as would render them personally liable. *McCourt's Appeal*, S. C. Pa., January 3, 1882.

AGENCY — ROBBERY OF AGENT INTRUSTED WITH MONEY—BURDEN OF PROOF.

Where an action is brought against an agent who, having received money to be carried to his principal, claims that the money is lost, the burden is on the agent to show that there was no breach of duty on his part; and this is to be determined upon consideration of all the circumstances; and, ordinarily, the question is one of mixed law and fact and not merely of law. *Darling v. Younker*, S. C. Ohio, January 31, 1882.

BOND—APPEAL—CONSIDERATION.

Where a party obtains delay, obstructs the collection of a judgment against htm by the execution of an appeal bond, there is sufficient consideration to uphold the bond, and it is not void, although the court to which the appeal is taken has not jurisdiction of the appeal. *Stevens v. Miller*, Kt. Ct. App., January 31, 1882.

CONVEYANCES—CONDITIONAL LIMITATION—VALIDITY—PERPETUITIES.

1. A grandfather conveyed, by deed of gift, to his grandson, three lots of land; the two first in fee, and the third for life. The third lot, for life, was given on the express condition that if it, or any portion of it, was aliened or attempted to be aliened by the grantee, he should forfeit the whole estate in the three lots conveyed to him; and they should at once vest in his sister and her heirs. The grantee sold a portion of the third lot given him for life. *Held*, that the condition in the deed restraining the alienation of the life estate is a valid conditional limitation, and the breach of said condition vested the whole property in the sister of the grantee and her heirs, as directed by the deed. 2. There was no sufficient proof that the condition in this deed created or continued a public nuisance, and for that reason should be declared void as being against public policy. 3. The condition in restraint of alienation being restricted to the life of the life tenant, the limitation over is not void as being too remote under the rule against perpetuities. *Camp v. Cleary*, S. C. App. Va., January Term, 1882.

CRIMINAL LAW—FORMER JEOPARDY—ESCAPE.

Where a prisoner, during his trial, fled the jurisdiction, whereby it became necessary to discharge the jury: *Held*, that he never was in jeopardy, and that a plea to that effect upon a subsequent trial was valid. *People v. Higgins*, S. C. Cal., October, 1881.

CRIMINAL LAW — HOMICIDE—SELF-DEFENSE—RESISTING OFFICER.

If a person disturbing the peace resists arrest, and in so doing kills the officer making the arrest, he is guilty of murder if he knew him to be an officer, and guilty of manslaughter if he did not know it. In such a case the law of self-defense, as rencounter between private persons, does not apply, unless the accused had reasonable ground to believe, and did believe, that the officer was not acting in good faith in the attempt to arrest, but was using his official position to gratify personal feeling against him, and that by submitting to the arrest, and to being disarmed, he would be in danger of receiving great bodily harm, or of losing his life. *Fleetwood v. Commonwealth*, Ky. Ct. App., January 5, 1882.

DEED—UNDUE INFLUENCE—UNSOUND MIND.

1. It is not a rigid rule in equity that a grantor must be proved to have been of unsound mind or under undue influence at the very time the deed impeached was executed. If it be shown that he was insane on a particular subject or with reference to a particular person, and the deed is an act referrible to that state of mind, no more is needed. 2. It is sufficient to invalidate any instrument executed for an inadequate consideration by a person of weak intellect, to show that the person in whose favor it is framed held a situation of confidence with respect to the maker of such instrument. *Jones' Appeal*, S. C. Pa., January 30, 1882.

EQUITY PRACTICE—MASTER'S REPORT—SUBMISSION TO PARTIES FOR ARGUMENT.

1. Masters are usually employed in taking accounts and making computations, and in making inquiries and reporting facts. In such references it was usual for the masters to prepare drafts of their reports before argument, and argument was heard before the master only on objections to the drafts. In such cases, manifestly, parties were entitled to an inspection of the drafts, and to be heard on their objections thereto. 2. But if a reference is made embracing questions of law and fact, and, after hearing the evidence and the argument of counsel, the master prepares a report of his findings, there is no good reason for observing the formalities of the old practice in submitting the report to the parties for hearing their objections thereto before the master. *Hatch v. Indianapolis, etc. R. Co.*, U. S. C. C., D. of Ind., January 21, 1882.

EQUITY—SPECIFIC PERFORMANCE OF CONTRACT—INADEQUACY OF CONSIDERATION.

The specific performance of contracts is not a matter of right, but rests in the sound discretion of the court. If the contract is unequal; if the consideration is inadequate; if it contains unreasonable provisions, or if there are indications of overreaching or unfairness, a court of equity will refuse to interfere for specific performance, and leave the party to his remedy at law. If the case is one in which either the provisions of the contract or the law would permit to a party the option to nullify a decree for specific performance, should one be granted, the court will not do a vain thing by granting one. *Rust v. Conrad*, S. C. Mich., January 18, 1882.

EXEMPTION—WHO IS HEAD OF A FAMILY?

A debtor who is a housekeeper, with one or more persons living with him, whom he is under a natural or legal obligation to support, and who are dependent upon him therefor, is entitled to the benefit of the exemption laws. The debtor in this case being a housekeeper, with a family, consisting of a woman, received and treated by him as his wife, and his son by her, is held to be within the rule, the father being under a natural and legal obligation to support his infant son, though born out of wedlock. *Bell v. Keach*, Ky. Ct. App., January 28, 1882.

FRAUD—RELEASE OF LIEN — PRIORITIES OF EQUITIES.

A judgment plaintiff, at the instance of the defendant, who was about to convey land, agreed that the vendee should take it clear of her lien, provided that the purchase money should be applied to the payment of her judgment, according to its priority. The amount realized was all consumed in the payment of antecedent incumbrances. *Held*, that the release could not be avoided because of having been executed in consequence of fraudulent representations by the vendor, whether the vendee knew of its existence or not; but that the release of this land did not avail the owners of other land previously conveyed to them by the defendant while subject to the lien of the same judgment. To enable them to support such a claim they must show that they gave notice before the release that nothing must be done by which their rights would be diminished. *Snyder v. Crawford*, S. C. Pa., October 3, 1881.

INSOLVENCY—ASSIGNMENT FOR BENEFIT OF CREDITORS—DUTIES OF ASSIGNEE—LETTING REAL ESTATE.

A voluntary assignee for the benefit of creditors is under no obligation to let the real estate included in the assignment, and, therefore, where he allowed the assignor to retain possession of, and to use said real estate: *Held* (reversing the decree of the court below), that he was not chargeable in his account with the rental value thereof. *Detwilers Appeal*, S. C. Pa., January 3, 1882.

INSURANCE—STIPULATION NOT TO SUE—WAIVER.

A policy of insurance contained a provision that no suit should be brought upon it after six months from the time of fire, and that none of its stipulations should be waived but by the written consent of the president and secretary. *Held*, that under such contract, the company would not be estopped by the act of a general agent, who represented that payment would be made amicably, and suggested that the assured forbear to sue. *Waynesboro Mut. Fire Ins. Co. v. Conover*, S. C. Wis., October 3, 1881.

JUDGMENT—SATISFACTION—NOTE.

1. The note of a debtor does not operate as a payment of an antecedent debt unless so intended by the parties. In the absence of such intention, express or implied, the note is treated as a conditional payment merely: that is, when actually paid. 2. If such antecedent debt has passed into a judgment, the same rule applies; the new note is considered simply as a conditional satisfaction of the judgment, and, upon the dishonor of the former, the latter revives and may be enforced at law or in equity. *Morriss v. Harveys*, S. Ct. App. Va., Sept., 1881.

JURY TRIAL—VIEW OF BURNED PREMISES BY JURY

The fact that the court ordered a view of the ruins of the premises destroyed by fire which were the subject of the action brought upon a policy of insurance, is no ground for a reversal of the judgment. On appeal this court will not reverse the judgment, because the counsel for the plaintiff in making the application for the order to view the premises made suggestions to the court as to what

the jury might discover by such view, which were improper, and which the jury might not be permitted to consider, if discovered by them on such view, in the absence of anything in the record showing that the jury were guilty of any misconduct in making the view, or that they were not properly instructed as to what matters they should consider in arriving at their verdict, which came under their observation in making such view. *Boardman v. Westchester Fire Co.*, S. C. Wis., January, 1882.

MORTGAGE—FORECLOSURE—WHAT QUESTIONS LITIGATED.

Foreclosure is not a proceeding in which to litigate the adverse and paramount title of a defendant who claims under the foreclosure of a previous mortgage, from which the complainant does not seek to redeem. *Bell v. Pate*, S. C. Mich., January 18, 1882.

NEGLIGENCE—PERSONAL INJURY—ADMISSIONS.

In an action for personal injuries, an admission of the general superintendent of the defendant made long after the injury complained of by the plaintiff, that the defendant was guilty of negligence, and liable to the plaintiff for the injury done, is not admissible as evidence against the defendant, unless accompanied by proof of the authority of such superintendent to make such admission on behalf of the defendant. Proof that the person making the admission was the general superintendent of the defendant company is not sufficient evidence of such authority. *Randall v. Northwestern Tel. Co.*, S. C. Wis., January, 1882.

NEGOTIABLE PAPER — PROMISSORY NOTE — CONSTRUCTIVE DELIVERY.

Where a father, for the purpose of equalizing his property among his children, procures his son to execute a note for a thousand dollars to his daughter, and himself takes the note into his custody and keeps it, and his daughter, without his consent or knowledge, obtains possession of the note and enters suit upon it, such circumstances will not amount to a constructive delivery of the note, and suit can not be maintained upon it. *Hatton v. Jones*, S. C. Ind. Com., February 1, 1882.

NOTES.

——A justice of the peace in Indiana set aside a verdict of a jury, and this is the way the Supreme Court "went for" him: "It is his plain and positive duty to enter judgment on such a verdict, for the statute gives him no power to set aside verdicts in criminal cases. Steel v. Williams, 13 Ind. 73; State v. Morgan, 62 Id. 35; Hawkins v. State, 24 Id. 288. It was not for him to set up 'his legal judgment and conscience,' as he denominates it, against the supreme law of the land. It will be an evil day when judges even of the highest dignity are permitted to place their individual judgment against the law declared by the constitutional authority. It would be bad enough for a judge occupying the most elevated position to arrogate to himself the power of bending the declared law to his individual judgment; infinitely worse to permit such a thing to be done by justices of the peace, who are, proverbially, not very learned in the law." Moore v. State, 72 Ind. 358. The best of it is that the Supreme Court itself set aside the verdict as void, it being rendered by six jurors. But that did not better the case of the justice.

——Governor Ordway, of Dakota, has lately perpetrated a legal blunder in his proposed use of "the Statute of Frauds," which deserves preservation as a joke in the misuse of legal terms. He issued a circular to the tax payers of a county in that Territory, where there was much talk about certain parties having caused the illegal issue of county bonds, and says: "If the parties who had thus, with full knowledge, wrongfully disposed of these outstanding obligations, wrongfully issued, failed to take them up, then the county should compel restitution under the Statute of Frauds." The absurdity of such a use of terms by a governor strikes a lawyer as extremely comical. He might as properly have recommended recovery under the Statute of Limitations, or under the statutes on marriage and divorce.

——One of the ablest and most conscientiously edited law journals in this country or elsewhere, is the *New York Daily Register*, to our appreciation of which our readers will have observed that we have borne witness by the frequency with which we have resorted to its columns for much interesting, amusing and valuable matter. Its selection of cases is adapted, of course, principally to the use of the bar of the metropolis; but its editorial comment upon matters of current interest to the professional world is valuable for the originality of the thought and the clearness and precision of expression, so dear to the well-trained legal mind.

——In Miller v. Hahn, 84 N. C. 226, the defendant claimed a bay mare under a bill of sale executed in February, conveying "one gray horse, also one black horse and one gray mare," and the plaintiff claimed the same mare under a bill of sale executed in May following, conveying "two horses, one a bay and the other a gray mare," and the bay mare was thereupon delivered to plaintiff. Held, that the bay mare belonged to the plaintiff. In other words, a "black horse" is not a "bay mare."

——The express company cases argued in the United States Circuit Court last week, were of special interest locally, as affording the members of our bar the opportunity of hearing eminent attorneys from no less than seven States, the cases of the express companies being argued by Messrs. Geo. F. Edmunds (Vt.), C. A. Seward (N. Y.), T. E. Whitfield (Miss.), and Judge J. A. Campbell (La.); and on the part of the railroad by Messrs. Broadhead (Mo.), Williams (Kas.), Wager Swayne (N. Y.), and B. C. Brown (Ark.); a number of others being present but not heard; the briefs filed showing over twenty, including Messrs. Blair & Perry, B. M. & C. J. Hughes; and from St. Louis, Messrs. Glover & Shepley, S. M. Breckenridge and F. J. Portis.